โอกาสที่ประเทศไทยจะประยุกต์ใช้การระงับข้อพิพาทแบบผสม Med-Arb

Opportunity for Thailand to apply the "Med-Arb Process" as an Alternative Dispute Settlement Mechanism

ดร. ปถวี ศุขกิจ

Dr. Pattawee Sookhakich*

Abstract

This article is an additional to the major contents of the doctoral thesis of the author which aims at the pros and cons of med-arb in international commercial arbitration. Mediation and arbitration are alternative dispute settlement mechanisms, which have slightly different characteristics, but they are used in combination in many countries around the world, including Canada, the United States, China, Hong Kong and other civil law jurisdictions and known as both "Med-Arb" and "Arb-Med", depending on which process was initiated first. Med-Arb is one of the conflict resolution mechanisms in which both mediation and arbitration is combined. In the process of Med-Arb, the same third-party neutral plays both roles of mediator and arbitrator. If the parties choose to initiate the process using mediation and the dispute remains unresolved, it will then move to arbitration. Laws and regulations of Thai mediation and arbitration are also being currently discussed and there is no record of med-arb ever being used in Thailand. The purpose of this article is to lend one more voice to the debate about the way for Thailand looking to the future to collaborate on improving the arbitration process by drawing a picture of the formation of Med-Arb. The adoption of an alternative method of Med-Arb is proposed as a prospective solution that can help to improve the efficiency of alternative dispute resolution (ADR) in the context of Thai ADR. The preconception of the success or failure of Med-Arb in international commercial arbitration is also challenged in this article, along with the principle impartiality of behavior of arbitrators and mediators, the enforcement of arbitral awards, disputing parties and arbitral centers in cooperation with the Med-Arb model. This is followed by a discussion of the practical problems that arise from the application of Med-Arb in the context of Thai law. Some

* Full-time lecturer, School of Law, Assumption University, LL.B. (Assumption University); LL.M. University of East Anglia, United Kingdom; LL.M., University Toulouse 1 Capitole, France; PhD in International economic law, Cotutelle Programme between University Toulouse 1 Capitole, France and University of Zaragoza, Spain

suggestions will be made for Thailand to apply Med-Arb and the way to set up future reform in order to step forward to become the center of international commercial arbitrations in the future.

Keywords: Med-Arb, Dispute Settlement Mechanism, Mediation, Arbitration

บทคัดย่อ

บทความนี้เป็นการศึกษาเพิ่มเติมและสรุปใจความสำคัญจากปริญญานิพนธ์ที่ผู้เขียนได้ศึกษาโดยมีวัตถุประสงค์ในการศึกษาถึงข้อดี ข้อเสีย[**]และการศึกษาและวิเคราะห์รูปแบบของอนุญาโตตุลาการระหว่างประเทศในกรณีการระงับข้อพิพาททางการค้า กระบวนการระงับข้อพิพาทโดยใช้ Med-Arb (Mediation-Arbitration) เป็นกระบวนการระงับข้อพิพาทโดยการรวมขั้นตอนของการไกล่เกลี่ยเข้ากับอนุญาโตตุลาการ การที่คู่พิพาทพยายามที่จะระงับข้อพิพาทเบื้องต้นโดยการไกล่เกลี่ย และหากไกล่เกลี่ยไม่สำเร็จคู่พิพาทสามารถนำข้อพิพาทดังกล่าวไประงับในขั้นตอนของอนุญาโตตุลาการได้ โดยที่ผู้ไกล่เกลี่ยในชั้นไกล่เกลี่ยข้อพิพาทและอนุญาโตตุลาการเป็นคนเดียวกันเนื่องจากระบบการไกล่เกลี่ยข้อพิพาทในประเทศไทย การอนุญาโตตุลาการทางการค้าของไทยยังไม่มีการนำวิธีการระงับข้อพิพาทแบบระบบผสม Med-Arb มาเป็นแนวทางปฏิบัติ ดังนั้นการระงับข้อพิพาทโดยใช้ Med-Arb นี้จึงเป็นโอกาสที่ประเทศไทยสามารถประยุกต์ใช้การระงับข้อพิพาทแบบผสมระหว่างการไกล่เกลี่ยข้อพิพาทและอนุญาโตตุลาการ

จากการศึกษาพบว่า ประเทศไทยควรตระหนักถึงความท้าทายและควรออกแบบหลักเกณฑ์ที่เหมาะสมโดยพิจารณาถึงปัจจัยดังนี้คือ ความท้าทายของบทบาทหน้าที่ของอนุญาโตตุลาการในการดำเนินการในขั้นไกล่เกลี่ยอนุญาโตตุลาการ ความเป็นกลาง (Neutrality) ความเป็นอิสระ ตลอดจนการบังคับคำชี้ขาดของอนุญาโตตุลาการ เพื่อให้เกิดการปฏิบัติต่อคู่พิพาทอย่างเท่าเทียมกันในขั้นตอนของกระบวนการพิจารณา เพราะจะทำให้คู่กรณีมีความรู้สึกว่าตนได้รับความเป็นธรรมในกระบวนการระงับข้อพิพาท แนวทางการปรับใช้การระงับข้อพิพาทแบบระบบผสมนี้สามารถเป็นแนวทางเลือกให้คู่พิพาท และสร้างความเชื่อถือในระบบการระงับข้อพิพาททางเลือก ซึ่งอาจจะส่งผลให้การอนุญาโตตุลการทางการค้าของไทยก้าวไปสู่การเป็นศูนย์กลางการระงับข้อพิพาทระหว่างประเทศในอนาคต

คำหลัก: การระงับข้อพิพาท การไกล่เกลี่ย อนุญาโตตุลาการ

[**] This article is a part of the publication of the dissertation topic “Achievements and Difficulties of Med-Arb as practiced within the framework of International Arbitration Law” was for the fulfill of completion of LL.M. studies at School of Law, University of Toulouse 1 Capitole, France

Introduction

The process of Med-Arb was introduced to combine the two methods into one when settling a controversial nurses' strike in the 1970s.[1] According to Professor Derek Roebuck, Med-Arb has been known since the ancient world, since it was normally used in ancient Greece, including Ptolemaic Egypt, when a mediation element was found in arbitration.[2] Med-Arb was used in labor conflicts in the late 1980s, when mediation was initially offered as a chance to resolve the dispute, but if the mediation was unsuccessful, arbitration was used in order to prevent the disruption of labor.[3] Med-Arb is a process of conflict resolution that combines both mediation and arbitration. It is known as both "Med-Arb" and "Arb-Med", depending on which process was initiated first. Med-Arb begins with mediation and then arbitration follows. Professor Kathleen Scanlon explains "Med-Arb" in general detail as any dispute may potentially be arbitrated and can be subject to mediation before, during, or after the arbitration.[4] The process involves the same person acting firstly, as a mediator, in order to facilitate a settlement between the parties and secondly, as an arbitrator to determine the issues under dispute and issue a final and binding award. If the parties choose to initiate the process using mediation and the dispute remains unresolved, it will then be arbitrated. If the parties have already reached an agreement on some issues during the mediation, the Med-Arbiter would only rule on the issues that remained during the arbitration process. The most important characteristic of this mixed process of Med-Arb is that the mediator is authorized to

[1] Sam Kagel has been credited as the first to combine the two methods. Read more in Richard Fullerton's "Med-Arb and its variants, Ethical issues for parties and neutrals" Dispute resolution journal (2010): 53. See also, Megan Elizabeth Telford, "Med-Arb: A viable dispute resolution alternative," retrieved from irc.queensu.ca/gallery/1/cis-Med-Arb-a-viable-dispute-resolution-alternative.pdf (Last visited 1 May 2018)

[2] Alan L Limbury, 'Making Med-Arb work' Article 1 ADR Bulletin 9(7) (2007), retrieved from http://www.epublications.bond.edu.au/adr/vol9/iss7/1 (Last visited 1 May 2018)

[3] Megan Elizabeth Telford, op. cit.

[4] Tai-Heng Cheng, "Reflections on Culture in Med-Arb" in Arthur W. Rovine (Editor) Contemporary issues in "International arbitration and mediation" The Fordham papers (2009): 421

make a binding decision regarding some aspects of the parties' dispute,[5] and this process guarantees a final resolution based on an informal opportunity to settle.[6]

One of the main questions to be answered in this article is "Is there an opportunity for Thailand to apply the Med-Arb Process as an alternative dispute settlement mechanism?" This will involve examining the effective use of mediation in conjunction with the arbitration procedures and the challenges that could possibly confront Thailand in developing Med-Arb. The terms 'arbitration' and 'mediation' will be discussed in the first part of the article based on the differences between arbitration and mediation under the Thai Arbitration law. The major aspects of the scope of Med-Arb will be analyzed from both sides of the argument regarding the benefits or disadvantages of applying the Med-Arb process. Suggestions will be made for the application of Med-Arb to the Thai arbitration system and these will be followed by some of possible practical problems of the Med-Arb process. Details of the meanings of mediation and arbitration processes may be helpful to understand the concept of "Mediation" and "Arbitration", and these are provided below.

A. Overview of the mediation and arbitration processes in Thailand

Mediation in Thailand is part of the court procedure. The Thai court of Justice has imposed regulations for mediation in two circumstances, namely, non-performance loans and general disputes. It is explained in the Civil and Commercial Code of Thailand that the mediation process may be conducted by "Judges" and according to statistics in 2018, the number of mediation and arbitration cases under the Thai Arbitration Institute (TAI) has gradually increased over time.

[5] Jay Folberg, Ann Milne, Peter Salem, Divorce and family mediation: models, techniques, and applications (New York: The Guilford Press, 2004), p. 120.

[6] Ibid.

B. Concepts of mediation, Arbitration, and Med-Arb

1. Concept of mediation

The word "mediation" means a discussion or negotiation, which actually means that a third party will resolve the issue, rather than the parties themselves.[7] Mediation is a process whereby a neutral and impartial third party, known as a mediator, facilitates communication between the negotiating parties to enable them to reach a satisfactory settlement. The duty of the third-party mediator is to act as a facilitator to negotiate the conflict in order to find the best solution for the parties without making a decision on the disputed issue. Mediators are only obliged to make any kinds of comment without determining the case, but they cannot make a decision about any issue that arises during the mediation. The mediator may only comment without determining that one side is right or wrong.[8] The mediation process, which is non-binding and voluntary, will be required to take place before a settlement is reached.[9] The mediation must be carried out by an independent and unbiased mediator in order to facilitate a negotiated resolution between the opposing parties.[10] Mediation is basically used as a tool to resolve litigation because it reduces the cost and the time involved in the process. More importantly, it affords the parties the ability to craft and control their own solution.[11]

2. Concept of Arbitration

Arbitration has become a popular procedure, which is used in a range of commercial settings to resolve conflicts related to contractual agreements. For example, the arbitration process is commonly applied in construction[12] and manufacturing, as well as international

[7] Thomas J. Stipanowich, Jung Yang, Jay Welsh, Chen Qiming and Peter Robinson, "East meets West: An international dialogue on mediation and med-arb in the United States and China" Pepperdine dispute resolution law journal 9,2 (2009): 386.

[8] Ibid.

[9] Christopher W. Moore, The Mediation Process: Practical Strategies for Resolving Conflict (San Francisco: Jossey-Bass, (2014), p. 15.

[10] James J Vlasic, "Alternative Dispute Resolution Section of the State Var of Michigan: Med-Arb—Can you afford the risk?" The ADR Newsletter, 15,1 (2008): 3-4.

[11] Thomas J. Stipanowich, Jung Yang, Jay Welsh, Chen Qiming and Peter Robinson, op.cit.

[12] In the case of construction, arbitration is used when the issues are specialized and technical; for example, when the costs of building defects need to be allocated among the architect, engineer, contractor, and

trade, labor-management, employment, the public sector, and insurance.[13] Arbitration is a private dispute resolution process in which the conflicting parties hire a neutral third party to hear the facts and make a decision for them based on their submissions. Arbitration is similar to a court judgment in that the disputing parties are able to reach a binding decision.[14] Unlike mediation, information revealed during the arbitration proceedings is not typically held as confidential.[15]

Mediation and arbitration serve different perspectives of the current arbitration rule in Thailand and attitudes toward mediation and Med-Arb are currently evolving. As explained above, it is evident from the concept of mediation that the parties use it as preparation for arbitration. Arbitration has been used as both an arbitration in court[16] and out of court procedure based on the Arbitration Act of 2002.[17]

Type	Role	Process	Advantages	Core disadvantages
Mediation (Med)	Mediator	Parties go through a negotiating process where the parties	Interest based negotiation. Parties make final decisions. Potential for	May not come to agreement, so time may be wasted.

property owner. Read more in Micheal F. Hoellering, "Arbitration and Mediation: A growing interaction" Dispute resolution journal 52 (1997): 23-25. See also, Mark Batson Baril and Donald Dickey, "Med-Arb: the Best of Both Worlds or just a limited ADR option?" https://www.mediate.com/pdf/V2%20MED-ARB%20The%20Best%20of%20Both%20Worlds%20or%20Just%20a%20Limited%20ADR%20Option.pdf (last visited 1 April 2018).

[13] James T. Peter, "Note & comment: Med-Arb in international arbitration" The American Review of international Arbitration 83,8 (1997): 3. See also, Mark Batson Baril and Donald Dickey, op.cit.

[14] Ibid.

[15] Ibid.

[16] In-Court arbitration refers to an arbitration considered by a Court of First Instance that is applied for the Thai Civil Procedure Code.

[17] Out of Court arbitration in Thailand is based on the Arbitration Act of 2002. The Arbitration Act of 2002 was based on the UNCITRAL Model law for Arbitration.

		themselves decide what the solution is.	transformation. Long-term satisfaction with agreements. Saves time with no arbitration. Confidential.	
Arbitration (Arb)	Arbitrator	Parties present their arguments to a neutral who makes the final decision for the parties.	Third party settles dispute. Due process. Guaranteed decision. Finality. Quicker than litigation.	Arbitration can be time-consuming. Costly. Potential for unsatisfying parties and resurfacing of conflict.

Arbitration has many advantages, one of which is that it less formal than litigation in the court. Secondly, arbitration is private. The parties can be confident that their dispute will be kept away from the eyes of the media and the public. Both parties to the arbitration, as well as arbitrator, are obliged to maintain the confidentiality of the whole arbitral proceedings and the arbitration award.[18] Since the arbitral proceedings are private, only the arbitrators, the parties, counsel and witnesses can attend, which guarantees the confidentiality of sensitive testimony documents.

3. Concept of Med-Arb

Mediation and arbitration are the most common forms of alternative dispute resolution for commercial disputes.[19] Alternative dispute resolution is a user-driven system of dispute

[18] The Singapore Arb-Med-Arb clause http://www.siac.org.sg/model-clauses/the-singapore-arb-Med-Arb-clause/71-resources/frequently-asked-questions#faq60 (last visited 3 April 2018)

[19] Chuyang Liu, "Navigating Med-Arb in China" University of Pennsylvania Journal of Business Law 17,4 (2015): 1296.

resolution based on the demands of the system's users. An explanation of the structure and background of Med-Arb will help to understand the concept of Med-Arb in the alternative dispute settlement context. Med-Arb is a form of alternative dispute resolution that combines mediation and arbitration. The method of Med-Arb can be divided into a two-stage process. The first stage involves the parties attempting to settle their dispute by means of mediation. Then, if some issues remain unresolved, they can move to the second stage, arbitration, in which the remaining unresolved issues are finalized with a binding decision.[20] This means that, if the mediation fails, the arbitrator will deliver the arbitral award based on the facts and evidence obtained from the previous completed arbitration proceedings to finally resolve the dispute.[21] The steps in the mediation process make use of mediation by referring to formal arbitration to decide any issues that cannot be settled in the mediation stage. The parties must agree to engage in Med-Arb. This combined process of mediation and arbitration provides the flexibility of mediation and the same person acts as an arbitrator to determine the decision-making stage of the arbitration.[22]

4. Types of Med-Arb[23]

There are five concepts of Med-Arb such as 1) Med-Arb pure, 2) Med-Arb Diff, 3) MEDOLA, 4) Med Windows in Arb and 5) High-Low Med-Arb It is important to note that this article is primarily concerned with the first concept of Med-Arb (Pure), in which mediation fails to reach settlement and compulsory dispute resolution by arbitration is mandated. From figure II below, it will be illustrated in this part that there are several variations of Med-Arb, not all of which contain the distinctive characteristic of finality. For instance, non-binding Med-Arb and Med-Arb are Med-Arb procedures that lack finality.[24]

[20] Hyung Kyun Kwon, "Med-Arb adoption in Securities law disputes: advantages and costs" Concordia Law review 2,1 (2017): 57.

[21] Thomas J. Stipanowich, Jung Yang, Jay Welsh, Chen Qiming and Peter Robinson, op. cit.

[22] Hyung Kyun Kwon, op. cit.

[23] Combine by Mark Batson Baril and Donald Dickey, op.cit.

[24] Ibid.

Type of Med-arb	**Role**	**Process**	**Advantages**	**Core disadvantages**
1)Med-Arb (Pure)[25]	One person is both the mediator and the arbitrator	Mediation takes place and if all issues are not resolved it goes to arbitration to decide remaining issues	Continuity of ideas via same neutral. Good chance of long-term satisfaction with agreements. Guaranteed decision. Finality. Speed of settlement.	Fear of arbitration decision pushes parties. Can be time consuming and expensive. Confidentiality issues. Coercive issues.
2)Med-Arb Diff	-Mediator and Arbitrator (two different people)	Mediation takes place and if all issues are not resolved it goes to arbitration to	Complete Separation of processes. Confidentiality is maintained.	Can be more time consuming and expensive compared with Med-Arb (Pure).

[25] For the post-part of arb-med and med-arb I have summarized six points. First both med-arb and arb-med ensure certainty that either by agreement, or by award, the dispute will be resolved. Second, when changing from one rule to another, the arbitrator may gain insight during the mediation phase that could contribute to a more appropriate award. Third, in the mediation phase of this hybrid, any suggestions by the mediator may carry more weight than in the mediation alone. In med-arb, the mediator will have the final say as arbitrator if the dispute is unresolved. In arb-med, the parties may take the mediator's suggestions as providing a glimpse of the already sealed award. Fourth, these processes provide an opportunity for the disputing parties to reach their own settlement agreement without worrying about issues regarding the legal fact of enforcement. Fifth, cost-effectiveness and efficiency save time and money of the disputants, and it is a speedy dispute resolution process if it is agreed by the disputants that the same neutral serves as both arbitrator and mediator in the arb-med and med-arb process. Sixth, most care about the final performance of the arbitral award by disputants if it is based on the mutually agreed settlement agreement. Read more in Thomas J. Stipanowich, Jung Yang, Jay Welsh, Chen Qiming and Peter Robinson, op. cit.

	- The two phases are conducted with different neutral decision-making	decide remaining issues.	Guaranteed decision. Finality. Speed of settlement.	
3)MEDOLA	One person is both Mediator and Arbitrator	Mediation and Last Offer Arbitration. After mediation, each party submits their last offer and the arbitrator must decide between the two offers.	Parties make the final recommendation based on their new knowledge in mediation. Parties are forced to make a reasonable offer. Guaranteed decision.	Limits the discretion of the Arbitrator. Can be time consuming and expensive. Moreover, the arbitrator does not reach an independent decision.[26]
4)Med Windows in Arb	One person can act as both or a new mediator can be brought in.	Process can move to mediation at any time within the arbitration in order to better understand and solve specific issues.	Parties are encouraged to mediate at strategic points. Creativity and flexibility are enhanced. Guaranteed decision.	Can be time consuming and expensive.

[26] Alan L. Limbury, "Med-Arb, Arb-Med, Neg-Arb and ODR" A Presented paper to the NSW Chapter of the Institute of Arbitrators and mediators Australia, Sydney (2005): 6

5)High-Low Med-Arb	Mediator and Arbitrator	The last offer each party makes during mediation transfers as the high/low amounts the arbitrator can award.	Parties maintain some control over final decision. No surprises. Guaranteed decision.	Can be time consuming and expensive

Figure II: Types of Med-Arb

C. Benefits for Thailand in applying Med-Arb

As mentioned earlier, there is little awareness of the dispute settlement mechanism known as Med-Arb in Thailand. However, the Thai Arbitration Institute (TAI) has recently introduced Med-Arb to encourage parties to mediate before proceeding to trial, and the Thai Court of Justice has applied two regulations of mediation. The first is a regulation for the mediation of financial disputes, for example, non-performing loans, while the second is for the mediation of general disputes. There are two types of mediators. The first is a judge mediator or a judge who is appointed to act as a mediator, while the second is a neutral private mediator who can mediate various disputes related to law, economics, social science, and family, labor and criminal cases. However, all types depend on the consent of the mediating parties.[27] One of the reasons for Thailand to think about adopting this process is that the United States and other foreign parties that have business interests in Thailand must often decide between commercial arbitration and filing a suit in the Thai courts when a dispute arises between them and a Thai party. If the parties choose to resolve their disputes at a commercial arbitration institution in Thailand, they will have to understand the practice of Med-Arb. There is no special focus on Med-Arb proceedings in Thailand as a result of the prohibition of regulations regarding mediation and arbitration.[28]

[27] Simon Roberts and Michael Palmer, Dispute Processes ADR and the Primary Forms of Decision-Making (Cambridge:Cambridge University Press,2005), p.153

[28] Global Legal Group, "A practical cross-border insight into litigation & dispute resolution"

Med-Arb processes are generally not well-established or widely used in Thailand[29] and there are no records of this system ever being used in Thailand.[30] Yet, Med-Arb enables parties to make a decision about their situation in a timely, cost efficient and informal manner compared to the process of litigation, which may be extremely stressful, very long and even personally painful. Despite the popularity of both mediation and arbitration under Thai law, each of these methods has problems. For example, mediation lacks a binding decision and arbitration limits the right to a judicial review and lacks party control.[31]

Thailand should consider learning a lesson from the authority of the Med-Arb mechanism in the role of international commercial arbitration to ensure that this alternative dispute resolution mechanism is applied effectively. Some scholars point out that the benefit of Med-Arb is that "linking the two techniques between mediation process together with the arbitration process creates an alternative dispute resolution dynamic that can make the whole a more effective force than the sum of the use of the two components (mediation and arbitration) individually."[32] This means that Med-Arb can be a good option for resolving disputes in Thailand. One advantage of applying the Med-Arb process in Thailand is that it serves the interests of both parties and provide them with these advantages of both forms of dispute resolution mechanism. If they fail to reach an amicable solution at the mediation stage, they may still resolve their dispute through arbitration.[33]

The use of Med-Arb means that the same neutral party serves as both mediator and arbitrator. The contribution of Med-Arb is the certainty of a final decision and binding settlement. Med-Arb offers the parties a chance to resolve their dispute using a less costly

---

http://www.tilleke.com/sites/default/files/ICLG-Litigation-Dispute-Resolution2011.pdf (Last visitd 1 March 2018)

[29] Ibid.

[30] Sorawit Limparangsri and Prachya Yuprasert, "Arbitration and Mediation in ASEAN: Laws and Practice from A Thai Perspective" https://www.coj.go.th/en/pdf/AlternativeDisputeResolution01.pdf (Last visitd 1 March 2018)

[31] Richard Fullerton, "The Ethics of Mediation-Arbitration" Colorado Bar Association 38,5 (2009): 31.

[32] Richard H. McLaren and John P. Sanderson QC, Innovative Dispute Resolution: The Alternative (Carswell, 1994), p.6-11.

[33] Tai-Heng- Cheng, "Some limits to apply Chinese Med-Arb internationally", NYSBA New York dispute resolution lawyer 2,1 (2009): 95.

and more efficient process, which is sufficiently flexible to achieve a consensual settlement prior to binding arbitration.[34] The parties do not have to hire another person if they fail to reach a settlement in the mediation phase and they can avoid the expense of educating the neutral party about the dispute.[35] In other words, Med-Arb would be less expensive than settling the dispute by arbitration and mediation separately. It is not necessary for the parties of Med-Arb to pay the additional expense of hiring a new arbitrator and they can also save time by not having to select a new date, time, and location for a separate arbitration.[36] Using the same neutral party can eliminate the need for the parties to identify, appoint and educate an additional neutral person.[37] This may encourage them to resolve their dispute at the mediation stage, because they know that the mediator will render a final and binding decision if the dispute is not settled at the mediation stage.[38] Furthermore, Med-Arb is progressive in that all the information in the mediation stage can be directly transferred to the arbitration. The combination of the ability of arbitration to produce a final and binding award and the flexibility of mediation means that Med-Arb is an unbeatable dispute resolution mechanism.[39] Furthermore, the stage of arbitration provides a clear end point with a strict timeframe and the parties can design the process themselves and choose their own decision maker.[40]

Med-arb can be clearly defined as follows; Mediation is a process whereby a neutral and impartial third party (the mediator) facilitates communication between the negotiating parties with the aim of enabling them to reach a settlement. Arbitration is a process whereby one or more neutral and impartial expert third parties hears and considers the evidence and testimony provided by the disputants and issues a binding or nonbinding decision.[41] Med-arb is a process whereby a neutral and impartial third party facilitates communication between

---

[34] Mark Bason Baril and Donale Dickey, op. cit.

[35] Tai-Heng Cheng, op. cit.

[36] Hyung Kyun Kwon, op.cot.

[37] Brian A. Pappas, "Med-Arb and the legalization of alternative dispute resolution", Harvard negotiation law review 20,157 (2015): 168.

[38] Kyriaki Noussia, Confidentiality in International Commercial Arbitration A comparative analysis of the position under English, US, German and French law (Verlag Berlin Heidelberg :Springer, (2010), P. 16.

[39] Brian A. Pappas, op. cit.

[40] Ibid.

[41] Richard Fullerton, op. cit.

negotiating parties and, failing a settlement, receives evidence and testimony provided by the parties and issues a binding decision

D. Challenging factors in alternative dispute resolution designed (Med-Arb) for Thailand

Ideally, it would be beneficial for Thai arbitration if foreign parties could recognize the value of med-arb in Thailand and acknowledge that it is not so different from what they are used to, and that Western practices can learn from it. A few guidelines could be considered by those considering med-arb. For example, a med-arb procedure should only take place with the written consent of the parties. It should not be used unless both sides are legally represented and have the opportunity to receive legal advice about the implications and the parties should always be given the option of an independent mediator as an alternative (this is useful to ensure that neither party feels that it is being pressured into a process with which it is not comfortable).

Problems may arise with med-arb in some case. For example, if the dispute is settled in the arbitration phase, the considerable time and money spent on the preceding mediation phase is likely to have been wasted. Involving mediation the arbitration means duplicating the work, incurring additional costs and possibly losing time. Any suggestions by the mediator in the mediation phase may be taken as hints of an already settled arbitral award. The most efficient way for avoiding these risks appears to be challenging the related factors in order to design the best alternative dispute resolution for Thailand. Many factors need to be discussed in order to produce the best model; for instance, how to perfectly combine mediation in the procedure and whether the use of med-arb is compatible with a fair arbitration procedure. Professor McLaren commented that the ability to design a med-arb process depends on the parties being suited to the specific process of a dispute, which is particularly attractive to many disputants. All the requirements in mediation and all the requirements in an arbitration process should also be available in the med-arb process.[42] The author divides the influence factors of Med-Arb in Thailand into two issues such as (i) ethical issue and (ii) Enforcement.

[42] David C. Elliott, "Med/arb: fraught with danger or ripe with opportunity?" https://www.albertalawreview.com/index.php/ALR/article/viewFile/1104/1094, (Last visit 12 April 2018) See also, Pattawee Sookhakich, op.cit

1. Challenges to the rule of natural justice on ethical issues

According to the concept of med-arb, the mediator is also the arbitrator.[43] The med-arb ethics of arbitrators should be based on a faithful and confidential relationship. The person appointed as the impartial third party is the one to be appointed as both the mediator and the arbitrator at the outset of proceedings. If the mediation fails, does the mediator automatically become the arbitrator or is the mediator to be subject to a time-limited confirmation or veto process? Does the mediator have a similar opportunity to decline to serve as arbitrator? If two persons are to be appointed, what will be their respective roles?[44] Both mediators and arbitrators must enact their duties in strict confidence and without prejudice. An important question regarding impartiality is "Can a med-arb remain impartial?" The difficulty of med-arb can be seen in the shift from mediation to arbitration. Behavioral problems and natural justice problems are difficulties regarding the dual role of mediator and arbitrator to avoid taking sides. This combined process requires mediators to be effective arbitrators, but the issue of bias is also problematic. The parties fear that a mediator who expresses opinions about the parties' positions will retain those opinions when arbitrating, and thus approach the arbitration with bias.

Not only is the issue of bias problematic, but also the issue of confidence in the mediation process. If the mediator becomes the arbitrator, a party will not know what the other party told the mediator in confidence. Moreover, many mediators have little or no experience of conducting an arbitral hearing and they may not be sufficiently competent to take on the other role.[45] The neutral person must be an independent and unbiased mediator in order to facilitate a negotiated resolution between the opposing parties. The person who plays the role of mediator and arbiter should be very careful to avoid taking sides. Both mediator and arbitrator should be careful in listening, aggressive interrogation, questioning the key issues, agreeing to focus on business interests and creating a dispute resolution plan. The mediator is a neutral third person who acts as a facilitator to achieve a negotiated solution. A mediator should be an independent and unbiased person, who will conduct the mediation based on

[43] Ibid.

[44] Ibid.

[45] Kyriaki Noussia, op. cit.

the principle of party self-determination. Parties may exercise self-determination at any stage of the mediation, including mediator selection, process design, participation in or withdrawal from the process, and outcome.

The issue of impartiality arises when a neutral person, who mediates and then assumes the role of arbitrator, may be biased. Impartiality means freedom from favoritism, bias or prejudice, neutrality and equidistance. Med-arbs lose their impartiality in cases where they are privy to confidential information which is never disclosed to a pure arbitrator. If the arbitrator is not impartial, there is a risk that it will lead to the prejudice of the decision, disclosures or proposals during the settlement as result of the advocates and parties having to present the extent information before a mediator who will play the role of an arbitrator. Not only is the issue of impartiality a cause for concern, but also the confidentiality of all information. One of the duties of a good mediator is to maintain the confidentiality of all information, since private information that could be helpful in finding a resolution in mediation could be used against a party in the looming arbitration phase. The neutral third party must act in good faith and give the parties the chance to answer the case against the other side in a private meeting. It is suggested that the parties could agree in advance of the arbitration if the mediation does not result in a settlement. To prevent bias in the parties not accepting the award, the mediator should rely on the information presented in the private meeting in which each party can speak freely without the other side commenting that the information is true or false. Sometimes they may make up a story that it is not true to injure the other party's credibility. The mediation is likely to work better when the parties and the mediator come from the same country.

2. Challenges to enforceability

The settlement of a med-arb is certainly the final and binding award by the tribunal not made by a mediator. The final binding decision is enforced by law in cases where mediation does not resolve the dispute and the arbitrator has provided a clear end point within an acceptable time. The parties make a decision on the basis of the disputants' choice. The med-arb can avoid hostility and create incentives for the parties to act in good faith and be more creative. However, the concept of med-arb also has an impact on the final arbitration if a med-arbiter threatens to move quickly to arbitration. Some systematic problems of dispute

resolution in Thailand are the absence of a mechanism or guidance for the domestic court to enforce a foreign arbitral award. Sometimes the court makes an adverse judgment to enforce the process and interferes with the arbitration on public grounds.[46] In the Thai jurisdiction, this configuration of decision makers may result in settlements that lack the protection of enforceability granted to awards by local laws. Parties who prefer med-arb should be accorded the legal effect by both international and national legal systems. Reform should be focused on the strict requirement of the arbitration law, which specifies a particular institution. Furthermore, the arbitration law needs to be amended with respect to mediation with the aim of setting basic protection for mediation systems, for example, the enforcement of mediation agreements and the protection of confidentiality in order to strengthen the process and give parties the confidence to apply mediation.

After the mad-arb award has been issued by an arbitrator, who has also acted as a mediator, the losing party will voluntarily comply with the award; on the contrary the winning party may find it difficult to apply this award as a result of the different jurisdictions in which the other party can claim. The nature of mediation to apply a final decision to settle the dispute will depend on party consensus with the help of the mediator, but med-arb is different in that mediators who also serve as arbitrators will exercise the final award. The opposing party can refuse to recognize and enforce the award, since it may be construed as impartiality. This point may be grounds for the court of the State to interfere based on Article V (2) of the New York Convention, depending on the approach of the national court of each country.

Conclusion

Med-arb, when successful, will focus on achieving an efficient outcome, which satisfies both parties. Efficiency concerns the amount of time required to settle the dispute. Med-arb will be an effective method to develop dispute resolution and play a more important role in Thailand, as well as on the international stage. Med-Arb gives parties the best that mediation and arbitration have to offer, providing incentives to resolve issues promptly, efficiently and in a less costly manner. However, the process of med-arb creates real difficulties in effectively combining mediation and arbitration because it is difficult to create a legal environment in mediation. What is more, there is another problem regarding the dual role of mediator and

[46] Kyriaki Noussia, op. cit.

arbitrator. In a case where the arbitrator also acts as a mediator, it will be difficult to adopt a range of means to resolve the issue in order to avoid taking sides.

In summary, although there is no record showing that med-arb has ever been used in Thailand, there is also no law that prohibits its application. Thai arbitration has undergone a long and varied developmental process. Based on this perspective, when applied in Thai law, the outcome of the med-arb will remain the key issue because structural adjustments to fully accommodate med-arb within the international legal framework for ADR are unlikely to occur in the near future.

Bibliography

Baril Mark Batson, and Dickey, Donald, "Med-Arb: the Best of Both Worlds or just a limited ADR option?"https://www.mediate.com/pdf/V2%20MED-ARB%20The%20Best%20of%20Both%20Worlds%20or%20Just%20a%20Limited%20ADR%20Option.pdf (last visited 1 April 2018).

Cheng, Tai-Heng, "Reflections on Culture in Med-Arb" in Arthur W. Rovine (Editor) Contemporary issues in "International arbitration and mediation" The Fordham papers (2009).

Cheng, Tai-Heng, "Some limits to apply Chinese Med-Arb internationally", NYSBA New York dispute resolution lawyer 2,1 (2009)

Elliott, David C., "Med/arb: fraught with danger or ripe with opportunity?" https://www.albertalawreview.com/index.php/ALR/article/viewFile/1104/1094, (Last visit 12 April 2018)

Folberg, Jay, Milne, Ann, Salem, Peter, Divorce and family mediation: models, techniques, and applications (New York: The Guilford Press, 2004).

Fullerton, Richard "Med-Arb and its variants, Ethical issues for parties and neutrals" Dispute resolution journal (2010).

Fullerton, Richard, "The Ethics of Mediation-Arbitration" Colorado Bar Association 38,5 (2009).

Hoellering, Micheal F.,"Arbitration and Mediation: A growing interaction" Dispute resolution journal 52 (1997)

Kwon, Hyung Kyun, "Med-Arb adoption in Securities law disputes: advantages and costs" Concordia Law review 2,1 (2017)

Limbury, Alan L., "Med-Arb, Arb-Med, Neg-Arb and ODR" A Presented paper to the NSW Chapter of the Institute of Arbitrators and mediators Australia, Sydney (2005).

Limbury, Alan L,'Making Med-Arb work' Article 1 ADR Bulletin 9(7) (2007), retrieved from http://www. epublications.bond.edu.au/adr/vol9/iss7/1 (Last visited 1 May 2018).

Limparangsri, Sorawit, and Yuprasert, Prachya, "Arbitration and Mediation in ASEAN: Laws and Practice from A Thai Perspective" https://www.coj.go.th/en/pdf/AlternativeDisputeResolution01.pdf (Last visitd 1 March 2018)

Liu, Chuyang, "Navigating Med-Arb in China" University of Pennsylvania Journal of Business Law 17,4 (2015).

McLaren, Richard H., and Sanderson QC, John P., Innovative Dispute Resolution: The Alternative (Carswell, 1994).

Moore, Christopher W., The Mediation Process: Practical Strategies for Resolving Conflict (San Francisco: Jossey-Bass, (2014).

Noussia, Kyriaki, Confidentiality in International Commercial Arbitration A comparative analysis of the position under English, US, German and French law (Verlag Berlin Heidelberg :Springer, (2010)

Pappas, Brian A., "Med-Arb and the legalization of alternative dispute resolution", Harvard negotiation law review 20,157 (2015).

Peter, James T., "Note & comment: Med-Arb in international arbitration" The American Review of international Arbitration 83,8 (1997).

Roberts, Simon and Palmer, Michael, Dispute Processes ADR and the Primary Forms of Decision-Making (Cambridge:Cambridge University Press,2005).

Stipanowich,Thomas J., Yang, Jung, Welsh, Jay, Qiming, Chen and Robinson, Peter, "East meets West: An international dialogue on mediation and med-arb in the United States and China" Pepperdine dispute resolution law journal 9,2 (2009).

Telford, Megan Elizabeth, "Med-Arb: A viable dispute resolution alternative," retrieved from irc.queensu.ca/gallery/1/cis-Med-Arb-a-viable-dispute-resolution-alternative.pdf (Last visited 1 May 2018).

Vlasic, James J,"Alternative Dispute Resolution Section of the State Var of Michigan: Med-Arb—Can you afford the risk?" The ADR Newsletter, 15,1 (2008)